

CALIFORNIA GEOTHERMAL, INC.

IBLA 78-413

Decided October 10, 1978

Appeal from decisions of the Oregon State Office, Bureau of Land Management, rejecting noncompetitive geothermal lease applications OR 12969, 12987, 12990, 12991, 12992, 16045-16048.

Set aside and remanded.

1. Administrative Procedure: Administrative Review—Geothermal Leases:  
Applications: Generally—Geothermal Leases: Discretion to Lease

A decision by BLM to refrain from leasing certain lands for geothermal resources will be upheld when the record shows the decision to be a reasoned analysis of the factors involved based upon considerations of public interest, and no sufficient reason to disturb the decision is shown.

2. Geothermal Leases: Applications: Generally—Geothermal Leases: Discretion to Lease—Geothermal Leases: Environmental Protection: Generally

When the reason given for the rejection of noncompetitive geothermal lease applications is that the lands possess a high visual quality, and neither the EAR nor the remaining documents of record clearly bear out such a determination and where it appears that BLM has issued leases on adjacent lands, the decisions rejecting the leases will be set aside and the cases remanded for further consideration to determine whether the lands should be leased with protective stipulations.

### 3. Geothermal Leases: Generally

Decisions by BLM to refrain from leasing certain lands for geothermal resources will be set aside and the cases remanded where a lease applicant shows on appeal that such decisions failed to take into account relevant considerations of public interest.

APPEARANCES: Clyde O. Martz, Esq., Stanley L. Grazis, Esq., Davis, Graham & Stubbs, Denver, Colorado, for appellant.

#### OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Francana Resources, Inc., operator and agent-in-fact for California Geothermal, Inc., has appealed decisions dated April 7, 1978, by the Oregon State Office, Bureau of Land Management (BLM), rejecting in whole or in part nine geothermal lease applications.

All the lands covered by the applications are in T. 23 S., R. 22 E., Willamette meridian, Oregon, within the Glass Butte geothermal interest area.

BLM's rationale for rejecting the lease applications is stated as follows in its decision as to OR 12969: <sup>1/</sup>

The environmental analysis record for the "Glass Butte geothermal interest area" shows that these lands possess high visual quality and that the Glass Butte area is in close proximity to a major travel route, U.S. Highway 20. Glass Butte is a well known scenic feature and completely dominates the view of travelers for a distance of about 12 miles along the highway. The surrounding flat terrain emphasizes the Butte, and the Butte provides significant accent to an otherwise uniform desert landscape. A discovery of commercially valuable geothermal resources on these lands would lead logically to construction of access roads and additional drilling pads plus subsequent installation of well heads, pipelines, one or more power plants, power lines, and/or other geothermal resource production facilities which would constitute intrusions into the established character of the landscape.

To offer the parcel for lease with a no surface occupancy restriction makes it unlikely that the lessee

---

<sup>1/</sup> The text of the remaining decisions is essentially identical to that quoted for OR 12969.

would be able to extract geothermal resources by directional drilling to any appreciable extent, if at all. Although the parcel is adjacent on one side to lands already under geothermal lease to the same applicant, it is primarily adjacent to lands which are likewise being rejected from three of the applicant's other geothermal applications. Leasing the lands in question under terms which would allow occupancy or make occupancy contingent upon some future showing would be inconsistent with the Bureau of Land Management's obligations to protect the visual resource values identified under Sec. 102(a)(8) of the Federal Land Policy and Management Act of 1976 (90 Stat. 2743).

The Environmental Analysis Record (EAR) for the Glass Butte geothermal interest area was prepared in 1976. A "new" visual resource section was added in June 1977. With respect to scenic value this part of the record states on p. 35:

Glass Butte itself does not possess outstanding scenic quality. It is no more scenic than other volcanic buttes in this region. However, it is in close proximity to a major travel route and completely dominates the view of travelers for a distance of about 12 miles along U.S. Highway 20. The prominence of Glass Butte and nearby Hampton Butte rising 1700 feet above the surrounding flat terrain provides the only significant accent to an otherwise flat uniform desert landscape. Vegetation and other features do little to increase or intensify the existing character.

On page 36 of the EAR there is a discussion of "Visual resource management analysis." According to BLM practice, visual resource management is divided into five classes, each class indicating the level or degree of visual impact which can be tolerated in a particular area. The record states (p. 36a) that Visual Resource Management (VRM) Classes II, III, and IV exist within the proposed geothermal lease area. These three classes are explained as follows (p. 36):

Class II: Changes in any of the basic elements (form line color or texture) caused by a management activity should not be evident in the characteristic landscape.

Class III: Changes in the basic elements (form line color texture) caused by a management activity may be evident in the characteristic landscape. However, the changes should remain subordinate to the visual strength of the existing character.

Class IV: Changes may subordinate the original composition and character but must reflect what could be a natural occurrence within the characteristic landscape.

Approximately one-third of the lands covered by appellant's applications were designated VRM Class II lands. Approximately two-thirds of the lands were designated VRM Class III lands. A visual resources map (EAR, following p. 36b) indicates that the Class II lands were determined to be a "foreground visual zone" of "high sensitivity" with "moderate scenery quality." The Class III lands were similarly determined to have a "foreground visual zone" of "high sensitivity," however with "low scenery quality." (See also appellant's Exhibit L, a color-coded map showing the rejected lands.)

The EAR states that an average of 770 vehicles per day travel U.S. Highway 20, that the bulk of this traffic is tourist oriented, and that the tourists are primarily rock hunters who could be expected to be "moderately sensitive to discordant sites on the landscape" (EAR p. 36a).

The EAR does not recommend against leasing any of the applied-for lands. It does project anticipated impacts throughout the various phases of development for geothermal resources and lists recommendations including possible lease stipulations for mitigation or enhancement of environmental impacts (EAR pp. 42-51).

The determination not to lease the applied-for lands is not clearly traceable to the EAR or to the other documents in the record. The decisions not to lease appear to have come at the culmination of a lengthy correspondence between the Geological Survey (USGS) and BLM, as well as in-house BLM correspondence. We quote salient portions of these documents, which show considerable disagreement between USGS and BLM on whether the leases should issue.

In a December 1, 1976, memorandum from the Prineville District Manager to the State Director (BLM), the district manager concluded that the EAR "has adequately considered the environmental effects of [issuing the leases]." He stated that "the lease terms, USGS, GRO Orders, and special stipulations to be attached to the proposed leases will mitigate to the extent possible any foreseen environmental damage." Attached to the memo were "Recommendations on Lease Applications" which included a special no-surface-occupancy stipulation No. 5 affecting all of appellant's lease applications. This stipulation reads: "The following described lands have a high visual quality. Therefore, no occupancy of the surface is authorized by this lease on the described lands. The Lessee, however, is authorized to employ directional drilling to the geothermal resources provided that such drilling will not disturb the surface." (Emphasis in original.)

USGS, however, did not concur in the inclusion of the above stipulation. In a memo to the State Director dated December 23, 1976, the area geothermal supervisor stated:

This office cannot concur in a stipulation which has not been properly based and will exclude entire leases from surface occupancy. If resources are identified in the lands which require withdrawal from leasing, then these resources should be specified. Neither the case for withdrawal from leasing nor restriction of surface occupancy has been made.

The Federal government cannot allow itself to be placed in the position of having issued unenforceable [sic] leases. To allow leases to be issued with all or major portions bearing a no surface occupancy stipulation would have exactly that result. Diligent exploration is required of a lessee by the lease terms and geothermal regulations and will require occupancy of the land, at least, commencing in the sixth year of the lease. As well, production obtained from adjacent state or private lands, or Federal lands which are being developed, would require that the lessee drill offset wells on the lease to protect the Federal government from drainage. A stipulation of no surface occupancy for the entire or greatest part of a lease makes the lease unenforceable [sic].

The geothermal supervisor recommended the following alternatives:

[R]eassess the lands in accordance with the criteria set forth in the Bureau of Land Management Visual Resources Management Handbook, and

- a) withhold from leasing those lands where no surface occupancy stipulation prevents development of the lease and usual intrusion is intolerable, or
- b) remove the no surface occupancy stipulation from all lands, or
- c) develop reasonable stipulations to protect scenic values while allowing development.

These comments of the USGS were considered by the Chief, Division of Resources, in a February 4, 1977, memo to the district manager, advising the latter to "reassess the visual resource and the lease recommendation." The memo went on to point out that USGS was correct in stating that the VRM Class II management classification did not support a no-surface-occupancy stipulation and continued:

Site development work for exploratory seismic test holes and temperature gradient holes could comply with VRM Class II standards if requirements for developed access roads could be avoided. Exploratory well drilling development would not comply with VRM Class II standards because of the requirements for high standard access roads, large scale grading of drill rig pad and drilling mud pit, and the introduction of a drilling rig structure. Plans for this phase of development would have to be critically reviewed on a site specific situation to determine visual resource impacts and mitigating measures for compliance with established visual resource management objectives.

Upon completion of your reassessment, you should obtain USGS's comments on any revision of leasing recommendations #5 and advise us accordingly. This work should be completed as soon as possible.

On May 18, 1977, the area geothermal supervisor submitted another memo to the district manager. He recommended therein that the "40 acre parcels adjacent to, and within the Class II boundary be leased with no surface occupancy." He further stated:

We were disappointed to note that your office adopted recommendation (a) "withhold from leasing those lands where no surface occupancy stipulation prevents development of the lease and usual intrusion is intolerable" of our December 23, 1976 memorandum to the Oregon State Bureau of Land Management office. Development of geothermal resources as an ultimate source of relatively cheap fluid for power generation is vital to the needs of our country now at a time when power generation costs are soaring due to the dwindling supplies of native fossil fuel and gas. Recommendation (c) "develop reasonable stipulations to protect scenic values while allowing development" will open up more areas for exploration and development of geothermal resources and still, at the same time, insure the reasonable protection of scenic values. [Emphasis in original.]

On June 7, 1977, the district manager transmitted an "Amendment to Recommendations On Lease Applications" to the State Director. Attached to the amendment was a map delineating no-lease and no-surface-occupancy areas covering all or portions of the appellant's lease applications. In pertinent part this memorandum states:

The attached visual resources map shows the area within the Class II zone which this office has decided to manage

as Class II which includes a no lease area with a 40-acre buffer of lease with no surface occupancy.

The no lease and no surface occupancy areas delineated on the attached map are identified as possessing Class II (high) visual quality by the revised visual resource management evaluation. This classification requires that any surface disturbing activity should not be evident on the landscape. However, the manual does leave a management option to manage the land at a lower classification. Therefore, this office has decided to manage the most critical portion of the Class II area as designated and the remainder under the next lower designation. It is hoped that this will allow the lease applicants to secure enough lease holding in the region to pursue exploration for the geothermal resource.

Special stipulation 5. is now amended to apply to those areas shown on the accompanying map as no surface occupancy areas. The remaining area shown as no lease will not be offered for leasing.

On October 18, 1977, BLM was in the final stages of adjudicating the appellant's nine geothermal lease applications. A memorandum of that date, from the Chief, Branch of Lands and Minerals Operations, to the Chief, Branch of Lands, Minerals and Recreation sums up BLM's position at that time:

The Acting Geothermal Supervisor (USGS) commented to the effect that the EAR did not support such a [no surface occupancy] recommendation in a memorandum to the State Director, dated December 23, 1976. As a result, Ron Russell worked with the district in preparing a revised Landscape Character section of the EAR to better document scenic values and, presumably, to reassess the recommendation. Despite some boundary adjustments from the previous visual resource management classifications applied to the Glass Butte Area, the net result, in June 1977, was a more restrictive impact on the geothermal leasing program by recommendation of a "no lease" area with a 40-acre "buffer" strip for leasing with "no surface occupancy." Nine applications are affected by the recommendation. All nine would be rejected in part and two would have no land available for surface occupancy.

We are in the final stages of adjudicating the nine geothermal lease applications. In so doing, we have become aware that the IBLA remanded four oil and gas lease cases (Utah) for further action where the BLM "... seeks to impose a 'no surface occupancy' stipulation,

the most stringent of stipulations, without a showing that it has considered less stringent stipulations, . . . but the record does not indicate that the State Office considered whether less onerous stipulations would be adequate to protect scenic and other values."

\* \* \* \* \*

We are not aware of any prepared statements by the State Office which can be construed as documenting whether the State Office has considered geothermal leasing in the "no lease" and "no surface occupancy" areas of Glass Butte with less stringent stipulations. Therefore, we request that you provide us with such documentation for the record as soon as possible. Without such documentation, we are dubious of proceeding in exact accordance with the current leasing recommendation. A working file on this situation is available for your review at your request.

In a memorandum dated November 15, 1977, the district manager advised the State Director of his position concerning the potential lease area:

The decision to manage part of the Class II area as other than Class II was based on the desire to compromise between the stringent restrictions of a Class II designation and the request for geothermal resources leasing. It was desired to allow leasing in most of the area but yet protect that portion which was decided to be the most critical portion of the Class II area (the area recommended for no lease and no surface occupancy). It was a management decision that the remainder of the area, although still Class II would be managed at a less restrictive level so as to hopefully allow geothermal resources exploration and development to proceed.

As of November 23, 1977, the Chief, Branch of Lands, Minerals and Recreation was still of the view that the leases could be offered to appellant with a no-surface-occupancy stipulation. He suggested that they be so offered with the justification that BLM was charged with the protection of visual resources. Nevertheless, the decisions rejecting the leases followed.

In its statement of reasons, the appellant has outlined salient portions of the EAR and the above administrative history. Appellant argues that the rejection of its applications does not follow the guidelines of IBLA decisions. Appellant contends essentially that BLM has laid no proper foundation and cited no adequate reasons for



the rejection of its applications. Appellant emphasizes the disagreement between USGS and BLM concerning the no-surface-occupancy stipulation. It contends that this stipulation is too stringent under the circumstances.

Appellant next contends that it should have been, but was not, consulted by BLM during the preleasing evaluation process under 43 CFR 3200.0-6(b). Appellant asserts that it was unable to present its own data on a number of critical issues. Its position on these issues is as follows:

1. In the subject areas, geothermal development need not be precluded because of recreational activities.
2. Exploration and development on the subject lands can be accomplished with minimum impact on the visual resources.
3. Disturbed areas can be rehabilitated.
4. There is little concern among area residents about the visual resources of Glass Butte, but there is interest in the economic growth geothermal development would promote.
5. The actual volume of traffic along Highway 20 and the orientation of vehicle occupants is open to question.
6. Geothermal development offers positive economic impact to the area.

Appellant further argues that rejection of its lease applications is arbitrary and capricious in view of the fact that leases covering similar lands in the Glass Butte area were issued. Such other lands, appellant points out, are of like visual quality yet some of the leases were issued without no-surface-occupancy restrictions. In this connection, appellant cites Southern Union Production Company, 27 IBLA 54 (1976), contending that the record in the case at bar (as that in Southern) demonstrates a lack of consistency in BLM action and a lack of concern for the fact that geothermal energy dissipates and is wasted if not developed, and that reasonable stipulations would prevent serious adverse impacts (S.R. pp. 15-17).

Appellant also challenges certain portions of the EAR contending that rejection of its applications is contrary to the public interest.

Finally, appellant requests a hearing pursuant to 43 CFR 4.415 in order to present evidence on issues of fact.

[1] Generally, a decision by BLM to refrain from leasing certain lands for geothermal resources will be upheld when the

record shows the decision to be a reasoned analysis of the factors involved based upon considerations of public interest and no sufficient reason to disturb the decision is shown. Southern Union Production Company, *supra*; Eason Oil Co., 24 IBLA 221 (1976); cf. Jack M. Vaughn, 25 IBLA 303 (1976); Boulder City Aero Club, 21 IBLA 343 (1975). In reaching its decision, BLM may follow the recommendation in an EAR. However, BLM should set forth in its decision appropriate references to the particular EAR and other relevant documents in order to provide sufficient basis for its determinations.

[2] As noted earlier, BLM's major reason for rejecting the applications was that the EAR showed the subject lands to "possess high visual quality" and that "resource production facilities would constitute intrusions into the established character of the landscape." Having studied the EAR and the remaining documents in the record, we find that the BLM decision overstates the case for the scenic quality of the Glass Butte area. Significant in this regard is the continuing disagreement between USGS and the district manager concerning the scenic value of the lands applied for. Throughout the administrative history of the case, the position of USGS was that the lands could be leased with protective stipulations and that a no-surface-occupancy stipulation was unsupportable. The controversy concerning the "no lease" and "no surface occupancy areas" was set forth in the October 18, 1977, memo, *supra*, by the Chief, Branch of Lands and Minerals. Therein he asked to be furnished with documentation showing whether less stringent stipulations had been considered. No such documentation was forthcoming. The next significant memo in the record contains the district manager's statement to the State Director advising the latter that it "was desired \* \* \* [to] protect that portion which was decided to be the most critical portion of the Class II area (the area recommended for no lease and no surface occupancy)." No justification or rationale is offered for this conclusory statement, nor does the district manager point out why the excluded areas are more critical than adjacent lands, where, according to appellant, leases had been issued without protective stipulations. Also not considered was the fact that due to topography some of the lands sought are out of the line of sight from Highway 20. We conclude that the BLM's refusal to lease the applied-for lands on the basis of high visual quality is neither supported by the EAR nor properly documented, particularly in view of the record herein which tends to indicate that leasing with protective stipulations might be appropriate. For these reasons the cases will be remanded for further consideration.

[3] We have set out above much of the information and considerations the appellant has presented on appeal. We believe that this data should properly be submitted to the State Office in support of appellant's position that leasing the applied-for lands would be in the greater public interest than nonleasing. As we have heretofore indicated, BLM's decisions do not provide a clear basis for its rejection of the leases. We therefore set the decisions aside and

remand the cases for further consideration. On remand BLM should determine whether protective stipulations are appropriate and, if not, clearly relate its reasons for excluding the applied-for lands to the record. Southern Union Production Company, supra. In view of our determination, a hearing pursuant to 43 CFR 4.415 is unnecessary. We believe the present record, absent any new cogent and countervailing data, warrants the issuance of leases with appropriate stipulations permitting surface development.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are set aside and the cases remanded for further consideration consistent with this opinion.

---

Frederick Fishman  
Administrative Judge

I concur:

---

Douglas E. Henriques  
Administrative Judge

## ADMINISTRATIVE JUDGE THOMPSON CONCURRING IN THE RESULT:

Where the authorized Bureau of Land Management official exercises discretion to reject a geothermal lease application for reasons relating to proper land use and public interest, I believe we should be reluctant to substitute this Board's perception for that of the responsible official. Nevertheless, I concur with the majority to the extent it remands this case for further consideration of all factors upon which the exercise of discretion must be based.

Appellant requested the opportunity to present evidence to augment the record on certain matters relating to the effect of issuance of the geothermal leases. I agree with the majority that the type of evidentiary hearing before an administrative law judge, as provided by 43 CFR 4.415, should not be ordered here. Appellant, however should submit whatever information it has to the District Manager of BLM and be afforded the opportunity for additional input before a final decision is made on these applications. For example, a major reason given for rejection of these applications is the possible adverse effect it would have on the scenery, especially to tourists traveling along the highway near the lands. Appellant proposes to submit evidence of the actual volume of traffic along the highway and the orientation of the occupants in the vehicles, i.e., if they are tourists, in fact. Appellant also proposes information on how exploration and development of the lands can be accomplished to minimize visual impact, particularly how any activity can be shielded from view along the highway by camouflage and siting techniques.

Accordingly, so the record can be as complete and informed as possible before a final decision is made in this matter evaluating all alternatives, including possible protective stipulations, I concur with the remand.

---

Joan B. Thompson  
Administrative Judge

